

Office of Chief Counsel
Internal Revenue Service

memorandum

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date:

to: Chief, Examination Division, Michigan District
Attn: Paul Villerot, Exam Group Manager

from: District Counsel, Michigan District, Detroit

subject: **Restricted Consents**

This memorandum is in response to your request for advice regarding our office's review of proposed language for restricted consents to extend the statute of limitations for assessment. The advice in this memorandum is subject to post-review in the National Office, which we will expedite. If you have any questions, please call the undersigned at (313) 237-6426.

DISCLOSURE STATEMENT

This advice constitutes return information subject to I.R.C. § 6103. This advice contains confidential information subject to attorney-client and deliberative process privileges and if prepared in contemplation of litigation, subject to the attorney work product privilege. Accordingly, the Examination or Appeals recipient of this document may provide it only to those persons whose official tax administration duties with respect to this case require such disclosure. In no event may this document be provided to Examination, Appeals, or other persons beyond those specifically indicated in this statement. This advice may not be disclosed to taxpayers or their representatives.

This advice is not binding on Examination or Appeals and is not a final case determination. Such advice is advisory and does not resolve Service position on an issue or provide the basis for closing a case. The determination of the Service in the case is to be made through the exercise of the independent judgment of the office with jurisdiction over the case.

Issue

Whether the attached Forms 872, Consent to Extend Time to Assess Tax, and the restrictive language contained therein are sufficient to extend the statute of limitations for assessment with respect to those issues for which the examination division may ultimately propose adjustments.

Conclusion

The attached Forms 872, Consent to Extend Time to Assess Tax, and the restrictive language contained therein should be modified as indicated below in order to extend the statute of limitations for assessment with respect to those issues identified by the revenue agent as possible anticipated adjustments.

Facts

The Michigan District Examination Division is currently conducting income tax examinations of the following individuals for the years [REDACTED] and [REDACTED]; [REDACTED] and [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED]; [REDACTED] and [REDACTED]. The earliest statute of limitations with respect to the assessment of additional income tax is [REDACTED], relative to the [REDACTED] Form 1040 Individual Income Tax Return for [REDACTED]. Statutes of limitations on assessment for the other individuals for [REDACTED] will expire between [REDACTED] and [REDACTED]. The taxpayers, with the exception of [REDACTED], have requested any consents to extend the statute of limitations be restricted to certain issues under consideration by the revenue agents.

At this point in the income tax examinations, the revenue agents have identified four issues/areas which might give rise to additional income tax deficiency adjustments. The four issues relate to the transfer of shares in [REDACTED] ("[REDACTED]"), by the individual taxpayers to their respective charitable remainder unitrust(s) in [REDACTED] and the subsequent sale of the [REDACTED] stock to [REDACTED], in [REDACTED] of [REDACTED]. The four issues are:

1. The calculation of the gain resulting from the sale of [REDACTED] shares by the "shareholders" to [REDACTED].

2. The determination of whether the gain resulting from the sale of [REDACTED] shares by the "shareholders" to [REDACTED] is reportable on the tax returns and thus, taxable to the individuals or, rather, to their charitable remainder unitrust(s). The revenue agents have indicated a possible assignment of income issue may exist with respect to the transfer of the shares of stock from the individuals to their respective trusts.

3. As a component of the calculation of the gain resulting from the sale of [REDACTED] shares by the "shareholders" to [REDACTED], a determination of the valuation of assets distributed by [REDACTED] to the "shareholders" which consist of the assets held by [REDACTED] and its subsidiaries immediately after the sale of the [REDACTED] stock to [REDACTED].

4. The alternative minimum tax and any other consequential changes to tax liability stemming from the direct or indirect effect on other items as a result of the resolution of the above issues.

The issue of shamming the entire stock sale in order to assess the corporate tax at the prior shareholder level was discussed during a conference call with the lease stripping ISP team and National Office on [REDACTED]. The audit team on the case does not feel this issue is relevant to their case and as a result should not be included in the restricted consents that will be provided to the prior shareholders to extend the statute on their individual tax returns.

The issue of shamming the stock sale and subsequently providing a vehicle to collect the corporate tax assessment is understandable. However, there are two barricades to this approach in this case:

a. (b)(7)a, (b)(7)e

[REDACTED]

b. (b)(7)a, (b)(7)e

[REDACTED]

It is our understanding the examination division has not developed complete facts necessary to determine, with any degree of accuracy, the amount of any deficiencies related to the above issues and that requests for information necessary for additional substantive factual development are currently outstanding. Consequently, our advice is based on our understanding of the issues as they have been presented to our office in your response to our request for supplemental information on [REDACTED] and the subsequent consents which have already been executed by the respective taxpayers.

(b)(5)(DP), (b)(7)a

Discussion and Analysis

Internal Revenue Code Section 6501(a) generally provides that a tax must be assessed within 3 years after a return is filed. However, it is often necessary to request extensions of the period of limitation in tax cases to provide adequate time for consideration of disputed issues.

Internal Revenue Code Section 6501(c)(4) provides that where the Secretary and the taxpayer have consented in writing to the assessment of tax after the time prescribed in I.R.C. Sec. 6501, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon. Forms 872 and 872-A may be used for this purpose.

A consent may be limited as to coverage. The Service has ruled a consent to extend the period of limitation may be restricted to one or more issues where such issues cannot be resolved within the normal limitation period, or prior extensions thereof because of the need to await establishment of an interpretative position through court decision, regulation, ruling or other National Office action. (Rev. Proc. 68-31, 1968-2 C.B. 917 as modified by Rev. Proc. 77-6, 1977-1 C.B. 539).

Internal Revenue Manual Sections 22.8 et. seq. (Rev. 01-01-2000) provide in part that:

As a general rule, the Service will enter into a restricted consent requested by the taxpayer if all of the following conditions exist:

a. The number of unresolved issues required to be covered by the restricted consent do not make it impractical to do so;

b. The scope of the restrictions must be clearly and accurately described for all of the unresolved issues;

c. The issues not covered by the restricted consent are agreed and provision is made for assessing any deficiency or, under certain situations, scheduling any overassessment (refund or credit) for the agreed issues;

d. The use of the restricted consent at the district level is approved by the group manager.

e. The language in the restricted consent is approved by District Counsel.

Based on the information provided to our office, it appears the four issues for which adjustments may be proposed can be clearly and accurately described in restricted consents to extend the statute of limitations for assessments related to those issues. It is our understanding the only issues which may give rise to deficiency assessments which would not be included in the restricted consents involve an aviation business of [REDACTED]. You have indicated the adjustments related to those issues will be resolved as partial deficiency assessments or, in the alternative, an unrestricted consent to extend the statute of limitations will be obtained for [REDACTED] and [REDACTED] for [REDACTED] and [REDACTED].

A Form 872, Consent to Extend the Time to Assess Tax is, essentially a unilateral waiver of a defense by the taxpayer, and not a contract. Strange v. United States, 282 U.S. 270 (1931); United States v. Gayne, 137 F.2d 522 (2d Cir. 1943); and Tallal v. Commissioner, 77 T.C. 1291 (1981). However, since I.R.C. Sec. 6501(c)(4) requires the parties to reach a written agreement, courts have applied contract principles to determine the existence of and scope of that agreement. Kronish v. Commissioner, 90 T.C. 684, 693 (1988); Southern v. Commissioner, 87 T.C. 49 (1986); and Piarulle v. Commissioner, 80 T.C. 1035, 1042 (1983). Thus, it is of paramount importance the restrictive language contemplated in the consents at issue accurately describe any areas of potential adjustments.

Basic Restrictive Statement

Internal Revenue Manual Sec. 22.8.11 (1)(c) requires that each restricted consent contain a basic restrictive statement and a description of the areas of consideration. The basic restrictive statement is: "The amount of any deficiency is to be limited to that resulting from any adjustment to (description of the areas of consideration) including any consequential changes to other items based on such adjustment." See, I.R.M. Sec. 22.8.12. The basic restrictive statement should be included on each proposed restricted consent.

Alternative Minimum Tax

Revenue Procedure 68-31, 1968-2 C.B. 917, sets forth procedures under which the scope of consents extending the limitation period for assessment may be restricted to one or more issues ("restricted consents"). It provides that where resolution of the principal issues subject to the restricted consent has an automatic effect on other items, e.g., medical expenses, which must be changed upon an increase or decrease in income, the restricted consent will cover both the principal issues and the related or automatic items. Revenue Procedure 77-6, 1977-1 C.B. 539, modified Rev. Proc. 68-31 to provide that automatic effect means any direct or indirect effect on other items caused by an adjustment to the principal issue. Therefore, where resolution of the principal issues subject to the restricted consent has a direct or indirect effect on other items, the restricted consent will cover both the principal issues and the consequential changes to other items.

Internal Revenue Code Section 55(a) provides for the imposition of an alternative minimum tax on income in certain situations. The revenue agents have indicated the alternative minimum tax may apply to some or all of the taxpayers at issue in the present case.

In Okin v. Commissioner, T.C. Memo. 1985-199, 49 T.C.M. (CCH) 1315, the Court explained the relationship between the alternative minimum tax and the income tax imposed by section 1 of the Code as follows:

The alternative minimum tax imposed by section 55 is entirely separate from the section 1 tax. This is clear from the language of section 55(a) which states that "there is imposed (in addition to all other taxes imposed by this title) a tax equal to the amount of such excess." The alternative minimum tax is imposed and computed independently of the section 1 tax; the only relationship between these two taxes is that only the excess, if any, of the tentative alternative minimum tax over the taxpayer's "regular tax" (essentially the section 1 tax, with certain modifications as provided in section 55(b)(2)) is imposed as the alternative minimum tax.

Okin, 49 T.C.M. at 1319.

Revenue Ruling 82-185, 1982-2 C.B. 395, considers whether self-employment tax can be assessed after expiration of the three year statute of limitations where the taxpayer reported all the income but failed to file Schedule SE or report the tax on the applicable line of Form 1040. I.R.C. Sec. 1401 provides for a tax on self-employment income in addition to other taxes. The ruling concludes that the filing of Form 1040 starts the running of the period of limitations on the assessment of self-employment tax even though none was shown on the return as filed. The ruling also points out both

individual income taxes and self-employment taxes are taxes under subtitle A of the Internal Revenue Code.

The rationale of Rev. Rul. 82-185 is equally applicable to the alternative minimum tax. In the instant case, the filing of the Forms 1040 for the respective taxpayers start the period of limitations on assessment of the alternative minimum tax. Accordingly, any assessment of alternative minimum tax could only be made after expiration of the three-year period of limitations on assessment if such assessment were covered by the terms of the restricted consent. Where the terms of restricted consents are silent as to the application of the alternative minimum tax, the statute of limitations may bar the assertion of any deficiency related thereto. Bauer v. Commissioner, T.C. Memo. 1992-257.

Thus, each proposed restricted consent must contain alternative minimum tax as an area to be covered for possible deficiency assessment after the expiration of the statute of limitations .

Suggested Revisions

We have reviewed the proposed restricted consents submitted to our office and recommend the language be changed to read as follows:

The amount of any deficiency is to be limited to that resulting from any adjustment to the transactions effected pursuant to the Stock Purchase Agreement ("the Agreement") dated as of [REDACTED] by and among [REDACTED] (" [REDACTED] ") and its shareholders, namely, The [REDACTED] ; The [REDACTED] ; The [REDACTED] ; The [REDACTED] ; The [REDACTED] ; and [REDACTED] (collectively, the "Shareholders"); and [REDACTED] (the "Buyer") including :

(a) The calculation of the gain resulting from the sale of the shares of [REDACTED] by the Shareholders to the Buyer pursuant to the Agreement, including any consequential changes to other items based on such adjustment;

(b) The determination as to whether the gain referred to in (a) is taxable to (insert name(s) of specific individual taxpayer(s)), or should be as reported in the returns of (insert name of entity where gains were reported) including any consequential changes to other items based on such adjustment; and

(c) any deficiency attributable to Alternative Minimum Tax imposed by Internal Revenue Code Section § 55(a), including any consequential changes to other items based on such adjustment.

. Should you have any questions or concerns regarding this matter, please contact the undersigned attorney at (313) 237-6426.

PHOEBE L. NEARING
District Counsel

By: _____
ERIC R. SKINNER
Attorney